UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: COYETTE DEON JOHNSON, Movant.	No. 07-6217 (D.C. No. 96-CR-80-L)

ORDER
Filed November 7, 2007

Before **HENRY**, **MURPHY**, and **O'BRIEN**, Circuit Judges.

Movant Coyette Deon Johnson, a federal prisoner appearing pro se, seeks leave to file a second or successive 28 U.S.C. § 2255 motion. We deny authorization.

Johnson was convicted in 1996 of three counts: (1) being a felon in possession of a firearm, (2) being an unlawful user of controlled substances in possession of a firearm, and (3) distribution of a controlled substance. He was sentenced to 237 months' imprisonment. On direct appeal, this court affirmed count one and count three and reversed count two and ordered it be vacated. *United States v. Johnson*, 130 F.3d 1420, 1431 (10th Cir. 1997). This court affirmed Johnson's 237-month sentence, however, because the district court had not considered the second count in imposing his sentence. *Id.*

In 1999, Johnson filed a § 2255 motion asserting two claims challenging his sentence, which was denied because he had not raised either claim on direct appeal. *See United States v. Johnson*, No. 00-6250, 2000 WL 1838700 (10th Cir. Dec. 14, 2000) (unpublished denial of a certificate of appealability). Thereafter, Johnson filed five motions in the district court challenging his sentence, all of which the district court ruled were attempts by Johnson to file second or successive § 2255 motions without first obtaining authorization from this court to do so, as is required by 28 U.S.C. § 2255 para. 8 and 28 U.S.C. § 2244(b)(3). In each case, the district court transferred the unauthorized motion to this court, *see Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam), and in each case, this court either denied authorization or dismissed the matter because Johnson failed to file a motion for authorization with this court. *See Johnson v. United States*, No. 06-6143 (10th Cir. June 21, 2006) (unpublished dismissal); *Johnson v. United States*, No. 05-6341 (10th Cir. Dec. 12, 2005) (unpublished dismissal); *Johnson v. United States*, No. 05-6018 (10th Cir. Mar. 21, 2005) (unpublished denial of authorization); *Johnson v. United States*, No. 03-6253 (10th Cir. Nov. 6, 2003) (unpublished denial of authorization); *Johnson v. United States*, No. 03-6082 (10th Cir. Apr. 17, 2003) (unpublished denial of authorization).

Most recently, Johnson filed a motion in district court entitled "Request for Permission to Appeal for Modification and Correction of Sentence." The district

court ruled that this motion was another unauthorized attempt by Johnson to file a second or successive motion and transferred the matter to this court. To obtain authorization to file a second § 2255 motion, Johnson must demonstrate that his proposed claims either depend on "newly discovered evidence" that, if proven would "establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty," or rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255 para. 8.

In his pending motion for authorization, Johnson again challenges his sentence. Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000),[1] he argues that his sentence violated his Sixth Amendment rights because it was calculated based on facts not included in the indictment and facts not determined by a jury: Johnson previously raised this same argument in a prior motion for authorization, citing *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). *See Johnson*, No. 05-6018. As we previously informed Johnson, none of these cases satisfies the § 2255 paragraph 8 requirement that Johnson show that his claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was

[1] Johnson also cites *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), which decision does not appear to have any obvious relevance to Johnson's proposed claims, and, in any event, has not been held by the Supreme Court to be retroactively-applicable to cases on collateral review.

previously unavailable." *Apprendi*, *Blakely*, and *Booker* do not apply retroactively to second or successive § 2255 motions. *Bey v. United States*, 399 F.3d 1266, 1268-69 (10th Cir. 2005).

Accordingly, we DENY Johnson leave to file a second or successive § 2255 motion. This denial of authorization is not appealable and may not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

Elisabeth A. Shumaker, Clerk